

2012 WL 7649545 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Ethan NEWMAN, Plaintiff,

v.

SELECT SPECIALTY HOSPITAL-ARIZONA, INC., a Delaware corporation, dba Select Specialty Hospital-Arizona (Scottsdale Campus); Select Medical Corporation, a Delaware corporation; Sharon Anthony, Chief Executive Officer; and John Does 1-200;, Defendants.

No. CV2010033589.
October 12, 2012.

Plaintiff's Response to Defendants' Motion in Limine No. 3 Re: Regulations

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(Assigned to the Honorable Arthur Anderson).

Ethan Newman, hereby responds to Defendants' Motion in Limine #3 Re: State and Federal Regulations. For all the reasons discussed herein, the court should deny Defendants' motion.

I. INTRODUCTION AND FACTUAL BACKGROUND.

To briefly remind the court, this is an **abuse** and neglect case brought by Plaintiff against Defendants pursuant to the Adult Protective Services Act, [A.R.S. § 46-455](#). Ethan Newman was 18 years old when he was admitted to Select Specialty Hospital - Scottsdale (hereinafter "Select") on December 19, 2008. Mr. Newman had been rendered an incomplete quadriplegic after being involved in a motorcycle accident. During his admission to Select, Mr. Newman experienced significant deterioration of a [pressure ulcer](#) on his coccyx. Mr. Newman remained at Select until January 8, 2009, when he was transferred to St. Joseph's Hospital.

II. LEGAL ARGUMENT

A. PLAINTIFF PROPERLY DISCLOSED THE FEDERAL AND STATE REGULATIONS AT ISSUE.

Contrary to Defendants' assertions, Plaintiff has properly disclosed the Federal and State regulations at issue in this case. In her Affidavit, Colleen Simpson, RN, Plaintiffs standard of care expert, set forth those areas of the Arizona Administrative Code that direct the conduct of the Administrator and director of nursing and how Select Specialty Hospital failed to meet those obligations. (Exhibit 1, Affidavit of Colleen J. Simpson, BSN, RN, CWON, ¶¶ 15). Although Plaintiff has listed the Federal and State regulations as exhibits for the trial, Plaintiff does not intend to offer these exhibits for admission; rather they are marked for reference in the event a witness needs to refer to them for specific wording. Plaintiff does, however, intend to offer testimony, from his expert, regarding these regulations, which is entirely proper and admissible.

B. PLAINTIFF IS ENTITLED TO USE EVIDENCE OF STATE AND FEDERAL REGULATIONS AND STATUTES AS A BASIS FOR THE STANDARD OF CARE.

It is well settled that violation of a regulation or a statute is evidence of negligence. *See RAJI* (Civil) 4th, Negligence 1. The court in *Brand v. J.H. Rose Trucking Co.*, 102 Ariz. 201, 205, 427 P.2d 519 (1967), stated, “[f]rom the failure to heed a statute or regulation, the law conclusively infers a want of reasonable care.” *See also Good v. City of Glendale*, 150 Ariz. 218, 221, 722 P.2d 386 (App. 1986), [a person who violates a statute enacted for the protection and safety of the public is guilty of negligence per se.]. Other states have similarly held that violations of statutes and regulations are evidence of negligence. *See, e.g., Bridgeforth v. Vanderver*, 225 Ark. 702, 284 S.W.2d 623 (1955); *Bussell v. Missouri Pacific Rail Road Company*, 237 Ark. 812, 376 S.W.2d 345 (1964); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976).

In the California case of *Gregory v. Beverly Enterprises, Inc.* 80 Cal. App. 4th 514, 522 (2000), “defendants argue[d] that although the regulations have nothing to do with the [California] **Elder Abuse** Act, and involve only the regulation of federal Medicaid payments, *Gregory* effectively used them to create a private cause of action. They also complain[ed] the instructions were too vague to provide meaningful guidance to the jury.” The court found, “the question before us is not whether violation of these regulations gives rise to a private right of action, but whether the duly authorized regulations can be used to describe the care required under an *existing* statutory right of action for **elder abuse**. *Id.*”

The *Gregory* trial court instructed the jury in the language of *California Welfare & Institutions Code § 15610.07* with regard to the **abuse** of an **elder**, and described how “[p]atients of skilled nursing facilities shall be treated and cared for” by reading portions of state statutes, and state and federal regulations governing patients' rights and patient care in skilled nursing facilities. The court also instructed the jury about the term “reckless neglect.” The *Gregory* court found that the instructions given “provided concrete examples which amplified the instruction on **elder abuse** based on Welfare and Institutions Code § 15610.07.”

Likewise in the California case of *Norman v. Life Care Centers of America*, 107 Cal.App.4th 1233 (2003), the issue was whether or not California Code of Regulations, Title 22 [in large part modeled after and incorporating the federal regulations], serves as a proper regulation to warrant a negligence per se instruction. The *Norman* court held:

[W]e conclude the regulations in question impose on Life Care duties of care, and a breach by Life Care of those duties of care constitutes the negligent failure ... to exercise that degree of care that a reasonable person in a like position would exercise. Accordingly, a violation by Life Care of those regulations in caring for an **elder** constitutes **elder abuse** neglect under the [California **Elder Abuse**] Act.

107 Cal. App. 4th at 1245. The court went on to say:

Furthermore, the regulations clearly were intended to protect the health and safety of nursing home residents by requiring the initial development and updating of appropriate care plans for them and notification of their physicians if there is any change in condition.

107 Cal. App. 4th at 1246. The conclusion of the court was, that by refusing an instruction on negligence per se, the trial court precluded *Norman* from arguing that Life Care's alleged regulatory violations were presumed to constitute negligence and therefore neglect under her **elder abuse** cause of action. *Id.* at 1250.

Defendants' argument views the regulations in isolation and outside the context of this case. Plaintiff will provide expert testimony from Colleen Simpson, RN who possesses the necessary expertise to explain to the jury the deficiencies in the standard of care in this case. The jury will not be read a set of regulations, or simply provided with copies of the regulations. Rather, the

jury will be given extensive testimony regarding the standard of care and the deviations from it in this case, and will then be directed to the regulations that create a basis for the standard of care.

In sum, Select Specialty Hospital failed to provide Ethan Newman with the necessary care and services to maintain his health and well-being. Plaintiff's expert, Colleen Simpson, RN will provide the support for her opinions that Defendants violated the standard of care, as well as the regulations, based on her education, training and experience. The appropriate foundation will be provided at the trial of this matter regarding the interplay between the regulations and the standard of care as well as how the regulations are relevant in this case.

Simply put, Plaintiff has disclosed, through affidavits, disclosure statements and deposition testimony what regulations are at issue, how they are relevant to the issues in this case and how the failures caused harm.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully request this Court deny Defendants' motion in limine and enter an order that references to state and federal regulations which govern hospitals and set the standard of care for such hospitals, including Select Specialty Hospital, are admissible at trial.

Dated this 12th day of October, 2012.

WILKES & MCHUGH, P.A.

By: /s/ Donna Y. Oh

Donna Y. Oh

Attorneys for Plaintiff